

STATE OF MAINE

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW DOCKET NO. FED-16-014

KAYLA DOHERTY

PLAINTIFF/APPELLANT

v.

MERCK & CO., INC.

and

**UNITED STATES OF AMERICA
DEFENDANTS/APPELLEES**

and

**ATTORNEY GENERAL FOR THE STATE OF MAINE
INTERVENOR DEFENDANT/APPELLEE**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
DISTRICT OF MAINE**

BRIEF OF PLAINTIFF/APPELLANT

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellant Kayla Doherty's medical malpractice and wrongful pregnancy case is before this Court on certification from the United States District Court for the District of Maine ("the federal court"), based on novel questions of state law that may be determinative of the case, for which there is no clear controlling precedent. At the heart of the dispute lies Maine's Wrongful Birth Statute ("WBS"), which was codified in 1986 as part of a significant effort at tort reform aimed at limiting medical malpractice claims under the Maine Health Security Act ("MHSA"), 24 M.R.S.A. Ch. 21. The MHSA's entire statutory scheme applies only to "an action for professional negligence."

As an integral part of the MHSA, the WBS provides that: "It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child." 24 M.R.S.A. § 2931(1). This "public policy" is based on a sexist, discriminatory view of women and the life choices they make with regard to contraception, because the Legislature has presupposed that a woman cannot possibly be thought to suffer harm if she has given birth to a healthy baby.

Certification of the questions presented comes after both Defendants Merck & Co., Inc. ("Merck") and the United States of America ("USA") filed motions to

dismiss Plaintiff Kayla Doherty's First Amended Complaint for a handful of reasons mostly rooted in the above "public policy" underlying the WBS. The federal court denied all motions to dismiss and granted Ms. Doherty's request to certify questions related to the applicability and constitutionality of the WBS to this case.

Kayla Doherty visited the Lovejoy HealthReach Community Health Center ("Lovejoy") in Albion, Maine on February 26, 2012 to inquire about birth control options. Appendix ("App.") at 14. Because Lovejoy is a federally supported health center,¹ this is a Federal Tort Claims Act case. App. at 14-15. The federal government's medical malpractice coverage extends to Lovejoy and its employees, including the osteopath whose negligence resulted in Ms. Doherty's wrongful pregnancy, Amanda Ruxton, DO. App. at 15.

Ms. Doherty was twenty years old when she discussed her goal with Dr. Ruxton to avoid pregnancy for the foreseeable future. App. at 26. She sought out a type of sterilization procedure—implantation of the long-acting contraceptive drug that Dr. Ruxton recommended, either Implanon or Nexplanon.² App. at 19. Implanon and Nexplanon are manufactured, distributed, licensed, labeled and marketed by Merck, a New Jersey Corporation. App. at 15. Implanon is a 4-

¹ See the Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C.A. § 233 and 28 U.S.C.A. §§ 2671-2680 (2006).

² It is not clear at this early stage in the proceedings which drug was actually used for Ms. Doherty's sterilization procedure, whether Implanon or its successor released in 2011, Nexplanon.

centimeter-long single rod with an ethylene vinylacetate copolymer core containing sixty-eight milligrams of etonogestrel, a type of hormone (progestin) highly effective at inhibiting ovulation and preventing pregnancy when administered correctly. App. at 15.

Implanon is implanted during a surgical procedure in which a syringe is used to create a hole on the inner side of a woman's arm to insert the rod just under the skin, between the bicep and tricep muscles. App. at 15; 26. In 2011, Merck obtained FDA approval for Nexplanon—a product nearly identical to Implanon except that the Nexplanon rod contains fifteen milligrams of barium sulfate to make it radiopaque, meaning it will show up on an x-ray. App. at 15. Both of these third-generation implantable contraceptives are intended to be long-lasting and irreversible for a period of at least three years, as they can only be removed following another surgical procedure performed by a physician. App. at 20.

The purportedly reliable, long-term protection against pregnancy afforded by Implanon and/or Nexplanon is functionally the same as sterilization. App. at 20. Earlier versions of these long-term contraceptives, like Norplant and the Depo Provera shot, have been used in other countries to achieve the sterilization of women. App. at 20. For years, physicians all over the world have performed either forced, coerced, or agreed upon sterilization of women using these implantable drugs for reasons such as population control, reduction in poverty,

attainment of welfare benefits, conditions of probation, or for women who are incarcerated. App. at 20. In fact, in the years since these drugs have existed, public policy the world over has treated them as tantamount to sterilization methods such as tubal ligation. App. at 20.

Merck first introduced Implanon to the Indonesian market in 1998. App. at 24. When Merck next introduced the drug in Australia in 2001, an unprecedented number of adverse events resulted, including nearly 100 unintended pregnancies. App. at 24. Implanon and Nexplanon both have a history of failed attempts at insertion due to a defectively designed applicator, which has in many cases including this one resulted in unplanned pregnancy. App. at 20. Physicians can erroneously believe that the rod has been successfully inserted because they fail to recognize that the rod remained stuck in the applicator during and after the procedure. App. at 16. Nevertheless, Merck promoted and marketed this defective product with knowingly inaccurate statements about its quality and efficacy. App. at 16.

The United States Food and Drug Administration did not approve Implanon for use until 2006—a full 20 years after the Maine Legislature enacted the WBS. App. at 24. Even after Merck discontinued the use of Implanon and replaced it with Nexplanon in 2011, the company failed to conduct adequate pre- and post-

marketing studies of the safety and efficacy of the drug's design, warnings, and insertion method. App. at 16; 25-26.

Dr. Amanda Ruxton attempted to insert Implanon and/or Nexplanon in Ms. Doherty's arm on February 28, 2012. App. at 26. Dr. Ruxton furthermore failed to obtain informed consent from Ms. Doherty by explaining the risks and dangers of the drug and its history of failed insertion. App. at 16; 26-27. During the February 28th sterilization procedure, Dr. Ruxton cut a hole in Ms. Doherty's arm and attempted to use a syringe to implant the drug. App. at 26. Unbeknownst to all, Dr. Ruxton negligently failed to insert the drug in Ms. Doherty's arm and the rod was never implanted. App. at 16; 19. Dr. Ruxton failed to check Ms. Doherty's arm after the sterilization procedure ended to see if the drug had been properly implanted, and she never instructed Ms. Doherty to check for it. App. at 16; 26. Dr. Ruxton failed to provide product literature on the importance of checking the position of the rod on a regular basis. App. at 16. The medical record of the procedure contains no information about which arm had been the site of purported insertion. App. at 16; 27.

Ms. Doherty began to feel ill in September of 2013 and later missed her menstrual period. App. at 27. A positive pregnancy test at Lovejoy on October 16, 2013 confirmed that she was pregnant. App. at 27. Ms. Doherty was devastated upon learning of her pregnancy because she had made responsible,

reasonable efforts to avoid pregnancy, especially in her early twenties when she earned only \$8.70 per hour. App. at 27. Despite extensive effort, the staff at Lovejoy could not find the Implanon and/or Nexplanon rod in Ms. Doherty's arm after confirming her pregnancy. App. at 16-17. After ultrasounds on each arm failed to reveal the implantable rod, a Lovejoy nurse told Ms. Doherty that: "Dr. Ruxton believes it was never inserted." App. at 17; 28.

In the months that followed, Ms. Doherty endured nausea, mental and physical pain and suffering, insomnia, swelling, and weight gain. App. at 28. She missed time from work and suffered lost wages due to her pregnancy. App. at 29. Ms. Doherty incurred medical and related expenses as a result of her unplanned pregnancy, including costs for treatment, hospitalization, physician care, monitoring, medication, and supplies. App. at 29.

On June 9, 2014, Ms. Doherty underwent a long and painful delivery producing a healthy baby boy. App. at 17; 29. Since that time, she has continued to suffer emotional distress related to her pregnancy and the complications associated with rearing a child as a single mother without adequate preparation, planning, and economic resources. App. at 17; 29.

Ms. Doherty's First Amended Complaint seeks damages for strict products liability, breach of express and implied warranties, negligence, and negligent misrepresentation as to Merck. App. at 17-18. The claims against the USA

include medical negligence and failure to obtain informed consent. App. at 29-30. Ms. Doherty also seeks a declaratory judgment that the WBS is unconstitutional under various provisions of the United States and Maine Constitutions, as well as existing U.S. Supreme Court precedent. App. at 18; 11; 35-37.

QUESTIONS CERTIFIED FROM THE FEDERAL COURT

1. Does the protection of Maine's Wrongful Birth statute, 24 M.R.S.A. § 2931, extend to the defendant Merck & Co., Inc., as a drug manufacturer and distributor? App. at 12.
2. If not, does the Law Court's decision in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986), which concerned a failed sterilization by a health care provider, apply to the plaintiff Kayla Doherty's claim against Merck as a drug manufacturer and distributor? App. at 12.
3. Does Maine's Wrongful Birth statute prohibit all recovery for Doherty against both defendants (Merck if it is covered by the statute, see question one, *supra*) because of the nature of the procedure she underwent? Or does the statute allow Doherty to proceed with her claims but limit the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy? App. at 12.

STANDARD OF REVIEW

Pursuant to M.R. App. P. 25(a) and 4 M.R.S.A. § 57, this Court may exercise its discretion to answer a certified question if the material facts are not disputed, there is no clear controlling precedent on point, and the answer, “in at least one alternative, would be determinative of the case.” *Fortin v. Titcomb*, 2013 ME 14, ¶ 3, 60 A.3d 765, 766. Here, the potentially determinative question is not one of disputed facts, but instead how to construe a statute. This case is ripe for certification because the interpretation of a statute “is a question of law,” not a question of fact.³

The Certified Questions may be answered at this early stage without a full factual record, because on a motion to dismiss under F.R. Civ. P. 12(b)(6), all well pleaded facts alleged in Ms. Doherty’s First Amended Complaint must be accepted as true.⁴ The same is true for a F.R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.⁵

³ *Strout v. Central Maine Medical Center*, 2014 ME 77, ¶ 10, 94 A.3d 786, 789. See also *Semian v. Ledgemere Transp., Inc.*, 2014 ME 141, ¶ 8, 106 A.3d 405, 408 (“We construe statutes de novo”); *Wister v. Town of Mount Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909 (“We review the interpretation of statutes . . . de novo as questions of law”); *Strickland v. Commissioner, Maine Dept. of Human Services*, 96 F.3d 542, 545 (1st Cir. 1996) (“[T]he interpretation of a statute . . . presents a purely legal question.”).

⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’ and “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). See also *Hersey v. Kemper Independence Insurance Co.*, 685 F. Supp. 2d 150, 153 (D. Me. 2010) (denying motion to dismiss); *OfficeMax Inc. v. County Qwik Print, Inc.*, 802 F. Supp. 2d 271, 277 (D. Me. 2011).

⁵ See *Stone v. Chao*, 284 F. Supp. 2d 241, 245 (D. Mass. 2003) (“Defendant’s motion to dismiss arises principally under Rule 12(b)(1), but also impliedly invokes Rule 12(b)(6). . . . Both rules require the court to construe all of the complaint’s allegations in favor of Plaintiff, the non-moving party.”).

SUMMARY OF THE ARGUMENT

This Court can easily dispose of the first and second Certified Questions. The plain language of the MHSA unmistakably omits drug manufacturers and product distributors like Merck from the list of health care providers and practitioners to which it applies. This makes abundant sense because the MHSA is expressly limited to medical malpractice claims against health care providers and practitioners. Merck is neither of those things, but instead a multi-billion dollar drug company.

Merck would have this Court believe that the “public policy” of Maine favors “big pharma,” insulating drug companies from liability when they engage in negligence. Neither the plain language of the WBS nor the legislative history behind it compels such an absurd conclusion. Nor does *Macomber v. Dillman* compel the conclusion that Merck desires, considering that the case had nothing to do with strict products liability and everything to do with medical malpractice.

In 1986, the Law Court expressly limited its holding in *Dillman* to a failed tubal ligation “sterilization procedure,” but Ms. Doherty never had such a procedure. More importantly, the concept of a “sterilization procedure” referenced by the Law Court and the Legislature in 1986 is very different from the kinds of reversible options available today for achieving long term sterility and infertility. Tubal ligation cannot be considered a permanent “sterilization procedure” because

in many cases the procedure can be reversed. In fact, tubal ligation is actually less effective at preventing pregnancy than Implanon/Nexplanon, when the drug is inserted successfully.

As to the third Certified Question, the “public policy” behind the WBS is a biased, unconstitutional attempt to undercut a woman’s fundamental reproductive rights. The WBS emphasizes protection of negligent medical providers over a woman’s fundamental Constitutional right to choose whether and when to bear a child, or the right to seek a legal remedy when that choice is removed by a negligent provider.

The WBS’s “public policy” necessarily derives from the antiquated belief that—without exception—motherhood is always a blessing, and a woman’s primary purpose is to bear children.⁶ Therefore, under no set of circumstances could bearing a child be consistent with damage in a legal sense. This “public policy” fails even rational basis review, and it was struck down years ago by the U.S. Supreme Court.⁷

In sharp contrast to the Legislature’s express intent, anyone familiar with the impact of unintended pregnancy knows that failed contraception can work a

⁶ See Michael T. Murtaugh, *Wrongful Birth: The Courts’ Dilemma in Determining a Remedy for a “Blessed Event,”* 27 PACE L. REV. 241, 249-50 (2007).

⁷ See Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2020 (1987) (commenting that wrongful birth statutes violate the due process clause by infringing upon “parental rights to make autonomous, informed procreative decisions” without furthering a compelling state interest, violate the equal protection clause by drawing “classifications that burden a fundamental interest” without surviving strict scrutiny, and employ classifications that “are not rationally related to a legitimate state interest”).

disastrous harm—especially for young single mothers earning low wages. As one medical journal explains: “Unintended pregnancies are expensive for patients and for society in terms of medical costs, the cost of caring for more children, and the cost to personal and professional goals.”⁸ For a mother like Kayla Doherty, who is morally opposed to abortion yet financially incapable of successfully supporting a child, the suffering associated with unintended pregnancy is tremendous.⁹ Ms. Doherty did not want to abort her son and she loves him with all of her heart. She simply asks to be compensated for Appellees’ negligence like every other tort victim in the State of Maine.

Nationwide, thousands of consumers of allegedly defective drugs like Viagra (erectile dysfunction), Propecia (hair loss in men), Yaz (contraception), and Seroquel (psychiatric conditions) enjoy the constitutionally mandated right to bring their claims to court and to seek a remedy for personal injuries caused by defective drugs.¹⁰ It makes little sense that “public policy” bars the claims of women when their attempt at responsible contraception fails its most basic purpose, but hundreds of men with erectile dysfunction or thinning hair are free to challenge the safety or efficacy of those drugs. The only way this contradiction could possibly make

⁸ Bartz, D & Greenberg, JA, *Sterilization in the United States*, 1 Rev. Obstet. Gynecol. 1, 23-32 (2008).

⁹ See also *Macomber v. Dillman*, 505 A.2d 810, 814 (Me. 1986) (Scolnik, J. concurring in part and dissenting in part).

¹⁰ See www.mnd.uscourts.gov/MDL.shtml (Minnesota MDL); <https://www.nyed.uscourts.gov/multidistrict-litigation-cases> (Eastern District of New York); and <https://www.judiciary.state.nj.us/mass-tort/> (New Jersey MDL).

sense would be to erase fifty years of U.S. Supreme Court precedent concerning contraception.

As a nation, our opinions about reproductive rights are divergent and impassioned. Nonetheless, the U.S. Supreme Court has long recognized that the Constitution: “is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”¹¹

For all of the reasons that follow, the WBS is unconstitutional both on its face and as applied to Plaintiff Kayla Doherty.

ARGUMENT

- I. AS TO THE FIRST CERTIFIED QUESTION, MAINE’S WRONGFUL BIRTH STATUTE WAS ENACTED AS PART OF THE MAINE HEALTH SECURITY ACT, WHICH DOES NOT APPLY TO A DRUG MANUFACTURER OR PRODUCT DISTRIBUTOR
 - A. UNDER THE PLAIN LANGUAGE OF THE MAINE HEALTH SECURITY ACT, A PRODUCTS LIABILITY CLAIM IS NOT AN “ACTION FOR PROFESSIONAL NEGLIGENCE”

When interpreting a statute, this Court first examines its plain meaning “within the context of the whole statutory scheme to give effect to the Legislature’s intent.” *D.S. v. Spurwink Services, Inc.*, 2013 ME 31, ¶ 17, 65 A.3d 1196, 1200

¹¹ *Roe v. Wade*, 410 U.S. 113, 117 (1973) (“We bear in mind, too, Mr. Justice Holmes’ admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905)).

(emphasis added). If no ambiguity exists, neither rules of construction nor legislative history need be examined. *Id.* An ambiguity exists only if the statute is “reasonably susceptible to different interpretations.”¹²

The Maine Health Security Act (“MHSA”) was specifically intended to “occupy the field” of claims against health care providers—not product manufacturers—and the protections of the MHSA for those health care providers will arise in any case that could trigger medical malpractice insurance.¹³ This is not such a case, and there is no reasonable argument that Merck has medical malpractice coverage for this claim.

In *Musk v. Nelson*, this Court clearly explained that the WBS is part of the entire MHSA statutory package, all provisions of which must be read together:

The Wrongful Birth/Wrongful Life provision, the section defining professional negligence, and the statute of limitations were all enacted as part of a package—the Maine Health Security Act. The sections must be read together.¹⁴

This language should end the inquiry with regard to the first Certified Question.

When all sections of the MHSA’s statutory “package” are properly “read together,” Ms. Doherty’s claim against Merck cannot possibly be considered an “action for professional negligence,” which is defined in part as an action against a “health care provider” or “health care practitioner” “arising out of the provision or

¹² *Semian v. Ledgemere Transp., Inc.*, 2014 ME 141, ¶ 8, 106 A.3d 405 (quoting *Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77, ¶ 10, 94 A.3d 786).

¹³ *D.S. v. Spurwick Services, Inc.*, 2013 ME 31, ¶ 19, 65 A.3d at 1200.

¹⁴ *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994) (internal citation omitted) (emphasis added).

failure to provide health care services.” 24 M.R.S.A. § 2502(6). “Health care provider” and “health care practitioner” are defined at 24 M.R.S.A. §§ 2502(1-A) and (2).

The Law Court has plainly stated that the WBS did not create a cause of action. *Musk*, 647 A.2d at 1200. Common sense dictates that the WBS could not have created a cause of action, because actions for professional negligence existed at common law. *Macomber v. Dillman*, 505 A.2d at 812. Instead, the WBS was intended to repudiate “certain types of actions” under the entire statutory umbrella of the MHSA. *Musk*, 647 A.2d at 1200.

There is no reasonable interpretation of the MHSA that would lead this Court to conclude that any subsection or subchapter applies to a drug manufacturer or product distributor. *See Brown v. Augusta School Dept.*, 963 F. Supp. 39, 40 (D. Me. 1997) (“The mandatory provisions of the MHSA . . . apply only to actions for professional negligence. Thus, if a plaintiff’s claim is not an action for professional negligence, then he need not serve and file a notice of claim or submit to a prelitigation panel.”). The WBS is not ambiguous; it simply does not apply to Merck.

B. EVEN IF AN AMBIGUITY DOES EXIST, THE LEGISLATIVE PURPOSE BEHIND THE WRONGFUL BIRTH STATUTE WAS TO LOWER MEDICAL MALPRACTICE PREMIUMS, NOT LIMIT THE LIABILITY OF MULTI-BILLION DOLLAR DRUG COMPANIES

In 1975, responding to a perceived “national crisis” regarding “the availability and cost of hospital and medical malpractice insurance,” the Maine Legislature created the Commission to Revise the Laws Relating to Medical and Hospital Malpractice Insurance.¹⁵ The Commission set out to enact an entire statutory scheme that would “insure the availability of medical and hospital malpractice insurance to physicians and hospitals throughout the State and to develop a more equitable system of relief for malpractice claims.”¹⁶

In 1977, the Legislature enacted the Maine Health Security Act (“MHSA”) as recommended by the Commission. The original MHSA allowed for arbitration of disputes related to “negligence in the performance of professional services” by a health care provider or physician.¹⁷

The Law Court reviewed a case involving a podiatrist under the 1977 version of the MHSA, concluding that: “Section 2903 has no application to malpractice actions against podiatrists since podiatrists, not being physicians

¹⁵ See Emergency preamble to L.D. 1825, “An Act to Create a Commission to Revise the Laws Relating to Medical and Hospital Malpractice Insurance”; P. & S. L. 1975, ch. 73.

¹⁶ *Id.* § 1. See also *Myrick v. James*, 444 A.2d 987, 990 (Me. 1982); *LaCroix v. Caron*, 423 A.2d 247, 247 (Me. 1980) (“Much of the data developed by the Commission for its report related to the cost of malpractice insurance for physicians and hospitals.”).

¹⁷ 24 M.R.S.A. § 2701(1), *repealed by* P.L. 1985, c. 804. The Legislature also created a Professional Malpractice Advisory Panel system, the purpose of which was to prevent frivolous claims against “physicians for professional malpractice.” *Id.* § 2801, *repealed by* P.L. 1985, c. 804.

within the meaning of the Act, are not subject to the dispute resolution procedures of the Act.” *Lacroix v. Caron*, 423 A.2d 247, 248 (Me. 1980) (internal citation omitted).

If services performed by a podiatrist in 1977 did not fall within the protections of this statutory scheme because the word “podiatrist” was omitted from the definition of “health care provider,”¹⁸ then there is no reasonable interpretation of the MHSA that would allow Merck to be considered a “health care provider” today.

In 1985, concerns about the rising cost of professional malpractice insurance continued despite the 1977 enactment of the MHSA. The Legislature therefore formed a Professional Liability Work Group (“Group”) to study possible solutions to the ongoing perception of a medical malpractice liability “crisis” in Maine.¹⁹

The Group’s efforts resulted in L.D. 2065, “An Act to Expedite the Resolution of Professional Negligence Claims, to Amend Selective Provisions of the Maine Health Security Act and to Abolish the Discovery Rule in Claims Against Health Practitioners, Health Providers and Attorneys.” L.D. 2065, §16 (112th Legis. 1986). The original draft of the 1986 amendments to the MHSA did not include a provision related to wrongful birth actions.

¹⁸ “Podiatry” was included in the 1986 amendments to the MHSA at 24 M.R.S.A. § 2502(2). See L.D. 2400 § 16, at p. 2 (1986).

¹⁹ See K. Kendall, “*Latent Medical Malpractice Errors and Maine’s Statute of Limitations for Medical Malpractice: A Discussion of the Issues*,” 53 ME. L. REV. 589, 605 (2001).

After various changes and compromises by “a coalition of people concerned about medical malpractice,”²⁰ the Group presented a new draft of the bill titled: “An Act Relating to Medical and Legal Professional Liability.” L.D. 2400 § 16 (112th Legis. 1986). Unlike the previous draft, L.D. 2400 included the Wrongful Birth provision now found at 24 M.R.S.A. § 2931. Still, the purpose of the MHSA remained to “stem the tide of rising malpractice costs.”²¹

A critical excerpt from the legislative record expands on the purpose of L.D. 2400:

The bill that you have before you, L.D. 2400, . . . was presented to us by a coalition of people concerned about medical malpractice. . . . The professional liability work group has worked for over a year trying to pull together provisions that would, in fact, lower the cost of medical malpractice insurance in Maine and then doctors would be able to continue in practice and the cost to the patients would be less.²²

Addressing the newly proposed wrongful birth provision of L.D. 2400, the Statement of Fact for L.D. 2400 indicates that the draft legislation:

[E]liminates claims for damages based on the birth and rearing of a healthy child, but permits damages for medical expenses, pain and suffering and lost earnings where a failed sterilization results in the birth of a healthy child.²³

L.D. 2400 was also intended to codify the 1986 decision in *Macomber v. Dillman*, a medical malpractice claim related to a failed sterilization procedure:

²⁰ 2 Legis. Rec. 1466 (2d Reg. Sess. 1986).

²¹ *Saunders v. Tisher*, 2006 ME 94, ¶ 15, 902 A.2d 830, 834 (citing *Butler v. Killoran*, 1998 ME 147, ¶¶ 9-10, 714 A.2d 129, 132-33).

²² 2 Legis. Rec. 1466 (2d Reg. Sess. 1986) (emphasis added).

²³ L.D. 2400, Statement of Fact, at 24 (112th Legis. 1986).

What the committee has done is basically codified a recent court case, the Dillman case, which says that you can claim damages for any medical expenses that you incur while you are pregnant, the medical expenses that you had going through the sterilization that didn't work, but if a healthy child is born, that you cannot claim damages for the raising of that child.²⁴

Before the federal court, Merck and the USA argued emphatically that Ms. Doherty's case should be dismissed because she did not obtain a "sterilization procedure." Given that the above legislative history was aimed only at a failed "sterilization procedure," if Appellee's arguments are correct, then why would Ms. Doherty's claim be limited at all?

Another important change in the 1986 amendment of the MHSA is that it defined "an action for professional negligence" and "professional negligence" for the first time. *See* 24 M.R.S.A. §§ 2502(6) and (7). The MHSA's definition of "health care provider" has remained unchanged since 1986.²⁵

There is no credible basis for claiming that Merck fits any of the MHSA's definitions or the legislative purpose behind the 1986 amendments. Therefore, the WBS does not apply to Merck.

²⁴ 2 Legis. Rec. 1466 (2d Reg. Sess. 1986).

²⁵ *See id.* § 2502(2) ("[A]ny hospital, clinic, nursing home or other facility in which skilled nursing care or medical services are prescribed by or performed under the general direction of persons licensed to practice medicine, dentistry, podiatry or surgery in this State and that is licensed or otherwise authorized by the laws of this State. "Health care provider" includes a veterinary hospital.").

C. ACCORDING TO TRADITIONAL CANONS OF STATUTORY CONSTRUCTION, THE WRONGFUL BIRTH STATUTE DOES NOT APPLY TO A DRUG MANUFACTURER OR PRODUCT DISTRIBUTOR

If there is any doubt whatsoever that the plain statutory text and legislative history expressly omit drug manufacturers from the kinds of “health care providers” entitled to the WBS’s protections, then basic canons of statutory construction will eliminate that doubt.

To begin with, statutes “in derogation of a natural or common right” (like access to the courthouse, due process, and a jury trial) must be “narrowly interpreted.”²⁶ Courts exercise caution in imposing prohibitions on litigants not expressly mandated by a statute.²⁷

Moreover, “statutory construction is a holistic process,” with this Court construing “the whole statutory scheme of which the section at issue forms a part so that a harmonious result” is reached. *McPhee v. Maine State Retirement System*, 2009 ME 100, ¶ 23, 980 A.2d 1257, 1266.

Another important canon is *ejusdem generis*, which means: “Where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the specific words.” *Yates v. U.S.*, 135 S. Ct. 1074, 1086 (2015).

²⁶Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, § 61:6 (6th ed. 2000). See also *General Motors Corp. v. Darling’s*, 444 F.3d 98, 109 (1st Cir. 2006) (explaining that “the statute’s silence means precisely the opposite of what Darling’s says it means”).

²⁷ *Id.*

Looking at the enumerated list of what is considered a “health care provider” or “health care practitioner” in the MHSA, a multi-billion dollar drug company bears no similarity.

This Court construes statutory language to avoid reaching “absurd, illogical, or inconsistent results.” *Kimball v. Land Use Regulation Comm’n*, 2000 ME 20, ¶ 18, 745 A.2d 387, 392. It would be both absurd and illogical to hold that Merck is a “health care provider,” a “health care practitioner,” or other entity entitled to statutory protection for medical malpractice claims. Similarly, the doctrine of *noscitur a sociis* is “particularly appropriate” for a statutory ambiguity where one group of words has a “readily apparent common denominator,” often justifying a “restricted meaning” for the statutory language.²⁸ The “common denominator” throughout the MHSA is medical malpractice and liability insurance, not strict products liability against a drug company.

²⁸ *Polaroid v. C.I.R.*, 278 F.2d 148, 152 (1st Cir. 1960). See also *In re Montreal, Maine & Atlantic Ry., Ltd.*, 799 F.3d 1, 8 (1st Cir. 2015); *U.S. v. Williams*, 553 U.S. 285, 294 (2008) (referring to *noscitur a sociis* for the proposition that words and phrases are ‘given more precise content by the neighboring words with which [they are] associated’). See also *Wescott v. Allstate Ins.*, 397 A.2d 156, 169 (Me. 1979) (“The maxim—expressio unius est exclusion alterius is well recognized in Maine as in other states.”).

II. AS TO THE SECOND CERTIFIED QUESTION, *MACOMBER V. DILLMAN* IS EITHER INAPPLICABLE TO MERCK, INAPPLICABLE TO PROCEDURES OTHER THAN TUBAL LIGATION, OR THE USE OF THE TERM “STERILIZATION PROCEDURE” IS AMBIGUOUS

A. *MACOMBER V. DILLMAN* WAS A MEDICAL MALPRACTICE CLAIM HAVING NOTHING TO DO WITH STRICT PRODUCTS LIABILITY

The plaintiffs’ complaint in *Macomber v. Dillman* alleged a wrongful pregnancy resulting from “the defendants’ negligent and careless failure to comply with the standard of care of medical practice in the performance of a tubal ligation.” *Macomber v. Dillman*, 505 A.2d 810, 812 (Me. 1986). The Macomers sued the physician who negligently performed the tubal ligation procedure as well as his employer. *Id.* No mention of a medical device, drug, or product is found in the opinion and there is no question the case pertains only to medical malpractice. Indisputably, if the Macomers brought their complaint before the Maine Superior Court today, it would be subject to the MHSA’s mandatory prelitigation screening panel process as an “action for professional negligence.” See 24 M.R.S.A. §§ 2851-2859.²⁹ When a products claim is brought against a physician or dentist, that claim also falls under the MHSA. See *Dutil v. Burns*, 674 A.2d 910, 910 (Me. 1996).

²⁹ See also *Saunders v. Tisher*, 2006 ME 94, ¶ 15, 902 A.2d 830, 834 (noting that the legislature “essentially made the MHSA applicable to any case that could implicate medical malpractice insurance”).

Conversely, claims not involving medical malpractice and not implicating medical malpractice insurance are not subject to the prelitigation screening panel process. *Brown v. Augusta School Dept.*, 963 F. Supp. 39, 40 (D. Me. 1997) (“The Court holds that because the Third-Party Plaintiffs’ claim against Dr. Cohen is one for contribution, it does not constitute an ‘action for professional negligence,’ as that term is defined in the MHSA.”).

Products liability claims involving medical devices, like this one against Merck, are governed by the six-year statute of limitations set forth in 14 M.R.S.A. § 752. *See Descoteau v. Analogic Corp.*, 696 F. Supp. 2d 138, 140 (Me. 2010). By contrast, the statute of limitations for an “action for professional negligence” under the MHSA is three years. 24 M.R.S.A. § 2902.

These differences highlight the fact that neither *Dillman* nor the WBS codifying it can be interpreted to apply to Ms. Doherty’s claim against Merck.

B. *MACOMBER V. DILLMAN* WAS EXPRESSLY LIMITED TO ITS OWN FACTS INVOLVING A FAILED TUBAL LIGATION; BECAUSE KAYLA DOHERTY DID NOT HAVE THAT PROCEDURE, THE CASE HAS NO BEARING ON HER CLAIM

The cause of action asserted in *Dillman* was not a new cause of action in Maine. *Macomber v. Dillman*, 505 A.2d at 812. “Since the early days of the common law a cause of action in tort has been recognized to exist when the negligence of one person is the proximate cause of damage to another person.” *Id.* The WBS simply codified *Dillman*. Because the Court said that the WBS merely

“repudiated”³⁰ certain causes of action, the only reasonable conclusion is that both the WBS and the holding of *Dillman* apply to the same set of narrow circumstances.

Indeed, the Law Court expressly limited the holding in *Dillman* to its precise facts—a failed tubal ligation procedure:

We hold for reasons of public policy that a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child. Accordingly, we limit the recovery of damages, where applicable, to the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time. Our ruling today is limited to the facts of this case, involving a failed sterilization procedure resulting in the birth of a healthy, normal child.³¹

From *Dillman*, two points are unassailable: (1) A cause of action for wrongful pregnancy always existed at common law, whether based on medical malpractice or strict products liability; and (2) the Court’s holding did not apply to claims other than failed tubal ligation procedures. Because Ms. Doherty’s cause of action arises from a different kind of failed sterilization procedure, neither the WBS nor *Dillman* should limit her claim for relief.

C. THE UNDEFINED TERM “STERILIZATION PROCEDURE” IN *MACOMBER V. DILLMAN*, LATER CODIFIED BY THE WRONGFUL BIRTH STATUTE, IS AMBIGUOUS

The WBS states that: “A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child.” 24 M.R.S.A.

³⁰ *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994).

³¹ *Macomber v. Dillman*, 505 A.2d at 813 (emphasis added).

§ 2931. Appellees would have this Court believe that the tubal ligation at issue in *Dillman* is the only kind of “sterilization procedure” a woman can have if she wants to avail herself of a remedy under § 2931(2). However, neither *Dillman* nor the WBS codifying it defines the term “sterilization procedure.” The term is ambiguous because it is undeniably susceptible of more than one reasonable interpretation. *See U.S. v. Godin*, 534 F.3d 51, 56 (1st Cir. 2008). “As often happens under close scrutiny,” the plain text of the WBS “is not so plain.” *U.S. v. Jimenez*, 507 F.3d 13, 19 (1st Cir. 2007).

One Maine case has suggested that there are “alternative methods for achieving sterilization” besides tubal ligation. *Box v. Walker*, 453 A.2d 1181, 1182 (Me. 1983). The Meriam-Webster online dictionary contains the following medical definition of “sterilize”: “To deprive of the power of reproducing.”³² The word permanent does not appear in the definition.

A research paper examining racial disparities in the use of sterilization in this country over the past century states that: “In addition to surgical sterilization, other forms of temporary sterilization proliferated in the United States during the 1990s and 2000s that may have served as alternatives to surgical sterilization.”³³

³² <http://www.merriam-webster.com/medical/sterilization>

³³ *See Thomas W. Volscho, Sterilization Racism: A Quantitative Study of Pan-Ethnic and Other Ethnic Disparities in Sterilization, Sterilization Regret, and Long-Acting Contraceptive Use*, at p. 10 (2009), found at <http://csivc.csi.cuny.edu/Thomas.Volscho/files/VolschoDiss.pdf>.

More than 30 years of medical research and product development have passed since the decision in *Dillman*. Those decades of research and development have proven that there is no valid basis for distinguishing between so-called permanent methods of “sterilization” and other reversible methods of long-term contraception, because permanent sterilization does not always exist regardless of the method used. Tubal ligation is reversible and at least one study has confirmed that nearly 15% of women who opt for tubal ligation later request information to reverse the procedure.³⁴ Another study related to the success rate of tubal ligation reversal even concluded that surgeons should anticipate the likelihood of a reversal in the future when performing the procedure in the first place, proving that this method of contraception is certainly not permanent.³⁵ Moreover, there are multiple methods for performing a tubal ligation, and each comes with a different success rate when reversal is later attempted.³⁶

Black’s Law Dictionary is of no better assistance in construing the term “sterilization” as used by the Maine Legislature in 1986, because the term dates back to 1905. Back then, sterilization referred to “the act of making (a person or other living thing) permanently unable to reproduce.” Black’s Law Dictionary

³⁴ Bartz, D & Greenberg, JA, *Sterilization in the United States*, 1 Rev. Obstet. Gynecol. 1, 29 (2008).

³⁵ See Jayakrishnan, K & Baheti, SN, *Laparoscopic Tubal Sterilization Reversal and Fertility Outcomes*, 4 J. Hum. Reprod. Sci., 4(3), p. 1/9 (2011) (“The gynecologist must use an effective technique of sterilization to minimise the failure rates, but at the same time, which causes minimal trauma, and aim at preserving the length of the tube so that reversal is more likely to be successful, should the patient’s circumstances change.”).

³⁶ *Id.*

(10th ed. 2014). In 1905, most methods of contraception available today were far from existence. Tubal ligation cannot possibly be synonymous with “permanently unable to reproduce,” or a search of the term “tubal ligation reversal” on PubMed would not return 665 published results.³⁷

As alleged in the First Amended Complaint, contraceptive drugs like Norplant and Depo Provera have been used all over the world to achieve the infertility—and therefore the “sterilization”—of women. Norplant is similar to Implanon but older. These implantable drugs are more akin to tubal sterilization than birth control pills, not only because they are long-acting methods of contraception, but also in terms of efficacy. In fact, various studies confirm that Norplant and Implanon can be more effective at preventing pregnancy than tubal ligation.³⁸ If Implanon is used correctly, its efficacy is 99.95% (overall pregnancy rate of 0.049 per 100 implants sold).³⁹

By contrast, tubal ligation by occlusion has a failure rate that is “higher than generally reported.”⁴⁰ The pregnancy rate associated with tubal occlusion increases as years pass, with the 10-year cumulative pregnancy rate for all types of

³⁷ See <http://www.ncbi.nlm.nih.gov/pubmed/?term=tubal+ligation+reversal>.

³⁸ See *Subdermal implantable contraceptives versus other forms of reversible contraceptives or other implants as effective methods of preventing pregnancy*, p. 1/7, at the WHO's Reproductive Health Library, http://apps.who.int/rhl/fertility/contraception/CD001326_bahamondes1_com/en/.

³⁹ Graesslin, O. & Korver, T., *The contraceptive efficacy of Implanon: a review of clinical trials and marketing experience*, 13 Eur. J. Contracept. Reprod. Health Care 1:4 (2008).

⁴⁰ Peterson, H.B., et al., *The risk of pregnancy after tubal sterilization: findings from the U.S. Collaborative Review of Sterilization*, 174 Am. J. Obstet. Gynecol. 4 (1996).

occlusion methods at 1.85%--more than with Implanon and Norplant.⁴¹ By comparison, oral contraceptives like the Pill have a typical use pregnancy rate of around 9% in the first year.⁴² One book about contraceptive technology reviewed the percentages of women experiencing an unintended pregnancy in the first year of typical use and placed Implanon, female sterilization, and male sterilization together at the bottom of the list—but Implanon’s failure rate was lower than both female and male sterilization.⁴³

As further proof that Norplant is synonymous with sterilization, the drug has garnered the attention of legal commentators for its use as a condition of probation, the receipt of welfare benefits, and other social issues:

Throughout United States history, the courts and various local and national governmental agencies have attempted to restrict individual reproductive freedoms. Sterilization of the mentally incompetent or socially “unfit,” chemical and surgical castration, and the use of mandatory birth control or sterilization as a sentencing tool are examples of government intrusion in this area.⁴⁴

Another law review article proves that “sterilization” is susceptible to a different meaning than the one pressed by Appellees: “The new technology in birth control, along with the recent experimentation of state welfare plans, raises the question of whether government-promoted sterilization through the use of this new

⁴¹ *Tubal Occlusion Failures: Implications of the CREST Study on Reducing the Risk*, Medscape General Medicine (1997), at p. 3/9, <http://www.medscape.com/viewarticle/719264..>

⁴² See https://en.wikipedia.org/wiki/Combined_oral_contraceptive_pill.

⁴³ Hatcher, RA et al., *Contraceptive Technology: Twentieth Revised Edition*, at Table 3-2 (2011).

⁴⁴ Kristyn M. Walker, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779, 780 (1993).

birth control could be part of a constitutionally sound welfare policy.”⁴⁵ Similarly, in 2013, an online news source reported that African immigrants were subjected to “involuntary sterilization” in Israel through the use of Depo-Provera.⁴⁶

Complicating matters, technological advances in the areas of reproduction and contraception are growing at a faster rate than could possibly have been anticipated by the Legislature in 1986 when it included the word “sterilization” in the WBS. Implanon was not approved for use in the United States until more than twenty years had passed, in 2006.

Innovative product development in this field continues. For instance, the Bill and Melinda Gates Foundation has recently funded an endeavor to deliver long lasting contraception to women worldwide via a microchip that can be turned on and off wirelessly via remote control. Anticipated for release in 2018, the device may provide contraception for up to 16 years.⁴⁷ In ten years, will this method of contraception be considered a “sterilization procedure” under the WBS?

⁴⁵ Kimberly A. Smith, *Conceivable Sterilization: A Constitutional Analysis of a Norplant/Depo-Provera Welfare Condition*, 77 IND. L. J. 389, 389 (2002). See also Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN’S L.J. 9, 20; 37 (1994) (“As the Norplant policy professes to ‘protect’ children of color by preventing their conception, it resurrects the historical sterilization abuse of women of color and its eugenic goals” and “the Norplant policy reinforces racist and sexist stereotypes used to justify sterilization abuse of women of color.”).

⁴⁶ See <http://www.forbes.com/sites/eliseknutsen/2013/01/28/israel-foribly-injected-african-immigrant-women-with-birth-control/>.

⁴⁷ See <http://www.washingtonpost.com/news/innovations/wp/2014/07/17/this-amazing-remote-controlled-contraceptive-microchip-you-implant-under-your-skin-is-the-future-of-medicine/>.

Because the use of the word “sterilization” in § 2931(2) is susceptible of more than one reasonable interpretation, the holding of *Dillman* and the WBS codifying it are both ambiguous.⁴⁸

Given the above evolution of contraceptive methods, the only reasonable interpretation of the WBS is that the term “sterilization procedure” in § 2931(2) applies to any long-lasting effort to render a woman infertile. Furthermore, the U.S. Supreme Court has used the “constitutional avoidance” canon of statutory construction to construe an ambiguity, “asking whether, given two plausible interpretations of that statute, one would be unconstitutional *as applied to the plaintiff*.” *Clark v. Martinez*, 543 U.S. 371, 395 (2005). If so, the court “picks the other (constitutional) reading.” *Id.*

III. AS TO THE THIRD CERTIFIED QUESTION, PROHIBITING ALL RECOVERY FOR KAYLA DOHERTY AGAINST BOTH DEFENDANTS WOULD BE UNCONSTITUTIONAL

A. KAYLA DOHERTY’S CLAIMS MUST BE ALLOWED TO PROCEED UNDER THE OPEN COURTS PROVISION OF THE MAINE CONSTITUTION

Under the Maine Constitution, every person, “for an injury inflicted on the person or the person’s reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without

⁴⁸ See *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 26, 58 A.3d 1083, 1093 (citing various definitions for statutory language, and concluding that the statute in question was therefore ambiguous).

sale, completely and without denial, promptly and without delay.” Me. Const. art. I, § 19. This “open courts” provision requires that the courts “must be accessible to all persons alike without discrimination, at times and places designated for their sitting, and afford a speedy remedy for every wrong recognized by law as remediable in a court.” *Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 6, 997 A.2d 92, 94.

Procedural requirements “for exercising the right to adjudication,” like a statute of limitations, have been upheld as constitutional. *Irish v. Gimbel*, 1997 ME 50, ¶ 6, 691 A.2d 664, 669. However, this case is not about procedural requirements. On the contrary, the WBS imposes a substantive, preclusive effect on a woman’s right to seek a remedy for a harm that is “recognized by law as remediable in a court.” In this regard, the WBS is unique.⁴⁹

Godbout dealt with a Maine statute of repose, “in which a party is required to act or otherwise risk the loss of rights.”⁵⁰ The Law Court upheld the three year statute of repose in the Maine Business Corporation Act because, “[a]lthough such statutes may cause ‘some hardship’ to plaintiffs, that hardship is not one of

⁴⁹ It is difficult to come up with another instance in which a litigant with a valid claim for civil damages, dating back to English law and existing at the inception of this country, has had that right completely removed by statute. Other statutes that act as a complete bar to recovery, such as the Federal or Maine Tort Claims Act, cannot be considered unconstitutional because they are entirely consistent with the doctrine of sovereign immunity under the Eleventh Amendment. In fact, such statutes give more rights to litigants than otherwise would have existed when the Constitution was enacted, because the Legislature has expressly consented to be sued and waived its sovereign immunity. See, e.g., *Waterville Industries, Inc. v. Finance Authority of Maine*, 2000 ME 138, ¶ 21, 758 A.2d 986, 992.

⁵⁰ *Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 7.

constitutional dimension.”⁵¹ The language in *Godbout* compels the conclusion that a statute with an absolute bar to recovery, which allows no remedy whatsoever for the harm suffered, would most certainly rise to the level of “constitutional dimension.”

The MHSA itself has been challenged a number of times on the theory that this process, with the panel’s findings potentially introduced to the jury at trial, violates both the open courts provision and the Constitutional right to a jury trial. For the same reason set forth above, the Law Court has rejected those arguments and found that medical malpractice plaintiffs still have a remedy, even if it has been limited by the Legislature’s enactment of reasonable procedural—*i.e.*, not substantive—requirements.⁵²

In *State v. Bilynsky*, the appellant unsuccessfully challenged the procedural rule governing the time within which a criminal defendant could withdraw his plea. 2008 ME 33, 942 A.2d 1234. The Law Court held that this procedural rule did not violate the open courts provision because, unlike Ms. Doherty’s complete bar to redress: “Rule 32(d) does not create an unreasonable obstacle to redress because a remedy is still available to a defendant with a valid post-conviction challenge.” *Id.* ¶ 6. For Ms. Doherty, however, there is without question an unreasonable obstacle

⁵¹ *Id.* ¶ 8 (citing *Choroszy v. Tso*, 647 A.2d 803, 807 (Me. 1994)).

⁵² *Irish v. Gimbel*, 1997 ME 50, ¶ 18, 691 A.2d at 672. See also *Maine Medical Center v. Cote*, 577 A.2d 1173, 1176 (Me. 1990).

to redress her harm—quite literally; Appellees argue that she has no remedy. This reading of the WBS violates the Maine Constitution.

Although the United States Constitution does not contain an open courts provision, the language of *Marbury v. Madison* establishes this Federal protection:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. 137, 163 (1803).

Macomber v. Dillman does not discuss or decide the constitutionality of a limitation on damages for “wrongful pregnancy.” 505 A.2d 810, 814 (Me. 1986). However, Justice Scolnik recognized the inherently unreasonable nature of the “public policy” argument now stated in the WBS. His opinion, concurring in part and dissenting in part, reads as follows:

To hold that a parent cannot be said to have been damaged or injured by the birth and rearing of a normal, healthy child is plainly to overlook the fact that many married couples, such as the plaintiffs, engage in contraceptive practices and undergo sterilization operations for the very purpose of avoiding the birth of a child. Many of these couples resort to such conception avoidance measures because, in their particular circumstances, the physical or financial hardships in raising another child are too burdensome. Far from supporting the view that the birth of a child is in all situations a benefit, the social reality is that, for many, an unplanned and unwanted child can be a clear detriment. This is not to say that there are not many benefits associated with the raising of a child. The point is that it is unrealistic universally to proclaim that the joy and the companionship a parent receives from a healthy child always outweigh the costs and difficulties of rearing that child. . . . I know of no instance where we have strayed from the common law principle that a tortfeasor is liable for every foreseeable injury proximately caused by his negligent act and we should avoid doing so here. The Court states that public policy dictates the result it reaches without explaining the source from which it was derived or the foundation on which it rests.

Id. at 814.

The WBS must be struck down because Appellees seek to have it read in such a way that would deprive Ms. Doherty of any and all right to a remedy, contrary to the clear requirements of the Maine Constitution.

B. KAYLA DOHERTY'S CLAIMS MUST BE ALLOWED TO PROCEED BECAUSE SHE HAS A CONSTITUTIONAL RIGHT TO A JURY TRIAL

Article I, § 20 of the Maine Constitution echoes the Seventh Amendment's⁵³ right to a civil jury trial for all litigants "unless it is affirmatively shown that jury trials were unavailable in such a case in 1820." *Irish v. Gimbel*, 1997 ME 50, ¶ 7, 691 A.2d at 669. *See also* Me. Const. Art. I § 20. This right entitles all tort victims, including those with products liability claims based on a defective drug,⁵⁴ to have a jury determine all material questions of fact in a case. *Irish v. Gimbel*, 1997 ME 50, ¶ 8. As noted above, the plaintiffs in a handful of Maine cases arising from medical malpractice screening panels or other procedural/evidentiary rules have argued that such rules violate their constitutional right to a jury trial.

This Court has upheld the screening panel process found in the MHSA because, as the U.S. Supreme Court stated in *Meeker v. Lehigh Valley R.R. Co.*, the process cuts off "no defense," interposes "no obstacle to a full contestation of all

⁵³ U.S. Const. Amend. 7.

⁵⁴ The FTCA forecloses a plaintiff's right to a jury trial, so one would not be available to Ms. Doherty in this unique medical negligence case against Defendant USA. However, this Court can still invalidate the WBS as an unconstitutional abrogation of the right to a jury trial as it applies to either the USA or Merck. The prohibition against a jury trial found in the FTCA does not violate the Seventh Amendment for the reasons stated in note 49, *supra*.

the issues,” and takes “no question of fact from either court or jury.” 236 U.S. 412, 430 (1915). However, the U.S. Supreme Court has also explained that:

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (emphasis added).

The WBS interposes not only an obstacle but also a complete bar to recovery, leaving no remedy to be decided by the court or jury. This is a clear and unconstitutional abrogation of the right to a jury trial. As discussed in Part II.B above, Ms. Doherty’s claim is simply “a cause of action in tort” where “the negligence of one person is the proximate cause of damage to another person.” *Macomber v. Dillman*, 505 A.2d 810, 812 (Me. 1985). Plaintiff would have had a right to bring her claim before a jury in 1820, and the Constitution mandates that she be allowed to do so now as well.

C. THE WRONGFUL BIRTH STATUTE VIOLATES THE
SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION
CLAUSES OF THE FOURTEENTH AMENDMENT⁵⁵

For more than fifty years the U.S. Supreme Court has recognized a woman’s due process right to privacy when it comes to contraception. As this jurisprudence evolved, the right of a woman to make her own decisions with regard to reproduction, contraception, and abortion was declared and repeatedly upheld as a

⁵⁵ U.S. Const. Amend. 14.

fundamental constitutional right. The WBS contravenes all of the U.S. Supreme Court precedent that follows.

i. Reproductive Rights Jurisprudence

In 1965, the U.S. Supreme Court recognized a woman's right to privacy with regard to the use of contraception in *Griswold v. Connecticut*. 381 U.S. 479 (1965). The Court examined Connecticut's ban on contraceptives, which had been prescribed for a married couple by a doctor for Planned Parenthood, leading to his and Executive Director Estelle Griswold's arrest. *Id.* at 480.

In striking down the ban on contraceptives as an unconstitutional violation of the Due Process Clause of the Fourteenth Amendment, the Court recognized that specific guarantees found in the Bill of Rights create "zones of privacy," which cannot be infringed upon by a state legislature. *Id.* at 484. Under *Griswold*, permissible government control over activities subject to state regulation "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms," such as the fundamental right to privacy involved in the decision to take contraceptives. *Id.* at 485.

Several years later, the Court decided *Eisenstadt v. Baird*, which challenged the constitutionality of a ban on contraceptives unless they were prescribed for married people. 405 U.S. 438, 441 (1972). Proponents of the statute argued its

purpose was to deter premarital sex, but the Court found that the statutory goal was instead to “limit contraception in and of itself.” *Id.* at 443.

Statutory schemes may treat different classes of people differently, as long as the classification is reasonable instead of arbitrary, bearing a “fair and substantial relation to the object of the legislation.” *Id.* at 447. In *Eisenstadt*, there was no reasonable explanation for why single people should be treated differently under Massachusetts’s birth control law aside from the fundamentally unfair notion that “contraception is immoral.” *Id.* at 452. (“Such a view of morality is . . . the very mirror image of sensible legislation.”). Accordingly, the Court held that the statute was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 454-55.

Eisenstadt stands for the proposition that single people with legislatively imposed barriers to contraception “must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation to support.” *Id.* at 452-53. Even in 1972, the Supreme Court understood the harm associated with unintended pregnancy:

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis added). The Maine Legislature overlooked this fundamental right when it declared that a woman does not suffer a legally cognizable injury when pregnancy is imposed upon her through the negligence of another.

Just as it was an unconstitutional deprivation of equal protection in *Eisenstadt* to treat married and single women differently for purposes of contraception, it is unconstitutional for § 2931(2) to treat the following classes of people differently for no articulable, fair, sensible, or rational purpose:

- Women who seek infertility via tubal ligation versus women who seek infertility via long-acting implantable drugs;
- Women who seek infertility via long-acting implantable drugs versus men seeking infertility via vasectomy; or
- Consumers of this State who seek a legal remedy for a defective product like Implanon versus consumers of this State who seek a legal remedy for myriad other defective products and drugs.

The Legislature's bald reference to "public policy" in § 2931(1) does not create a legitimate, rational basis for enacting the WBS.

In *Roe v. Wade*, the Supreme Court explicitly framed a woman's right to privacy with regard to reproduction as being a fundamental, constitutionally protected personal choice:

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. 113, 153 (1973).

Roe v. Wade explicitly recognized the harm flowing from unintended pregnancy, holding that: “the right of personal privacy includes the abortion decision.” *Id.* at 154. This holding unquestionably forecloses the “public policy” pronouncement contained in the WBS. To the extent that Appellees will advance the abhorrent argument that Ms. Doherty “could have gotten an abortion” to remedy her situation, the argument would fail. Abortion is not a situation undertaken lightly by most women. As such, it would still give rise to a claim for emotional distress damages based on wrongful pregnancy.

Just because abortion is legal does not mean it is morally acceptable to every woman, or on balance the “right” personal choice for a woman to make even at the age of 21. Ms. Doherty loves her son and this lawsuit is not about him being “unwanted.” Rather, it is about the economic burden that results when the life altering consequences of motherhood are forced upon a woman too soon as a result of another’s negligence.

Following *Roe v. Wade*, the U.S. Supreme Court further explained that the “decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices,” and “decisions whether to accomplish or to prevent conception are among the most private and sensitive.” *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) (emphasis added).

When pressed to overturn *Roe v. Wade*, the Court instead reaffirmed, again finding that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992). The Court addressed the reasons why freedom of contraceptive choice is a fundamental right, and the rationale applies with equal force to invalidate Maine’s WBS:

[Matters] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. at 851.

Directly on point with this case, the Supreme Court of Georgia has considered whether a wrongful pregnancy action should be allowed to proceed, noting that:

The U.S. Supreme Court in *Roe v. Wade* and *Griswold v. Connecticut* has recognized that a woman has the right to plan the size of her family. Various arguments based on policy as well as practical considerations have been raised against a cause of action for wrongful pregnancy or wrongful conception. It has been suggested that recognition of such a cause of action would open the door to fraudulent claims, that the injury is remote from the negligence, that recovery would be out of proportion to the defendant's culpability. But these same arguments have been made in connection with countless other tort claims, and the problems presented have been dealt with in the course of traditional tort litigation.⁵⁶

The Massachusetts Supreme Judicial Court has criticized the "judicial declaration that the joy and pride in raising a child always outweigh any economic loss the parents may suffer," stating that this kind of public policy "simply lacks verisimilitude." *Burke v. Rivo*, 551 N.E.2d 1, 4 (Mass. 1990). Indeed, the "very fact that a person has sought medical intervention to prevent him or her from having a child" proves that, for some, the benefits of parenthood do not outweigh the burdens. *Id.*⁵⁷

Although the preceding jurisprudence is now decades old, the U.S. Supreme Court has recently reaffirmed the fundamental principles discussed above, stating that: "A first premise of the Court's relevant precedents is that the right to personal choice . . . is inherent in the concept of individual autonomy."⁵⁸

Whenever a statute infringes upon a fundamental right, it must be analyzed under the rubric of strict scrutiny. Such a statute will be upheld only if it provides

⁵⁶ *Fulton-DeKalb Hosp. Authority v. Graves*, 314 S.E.2d 653, 654 (Ga. 1984) (internal citation omitted).

⁵⁷ See also *Lovelace Medical Center v. Mendez*, 805 P.2d 603, 612 (N.M. 1991).

⁵⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). "Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make." *Id.*

“the least restrictive means needed to support a compelling state interest.”⁵⁹ There is no compelling state interest here to protect.

ii. Gender-Based Discrimination and the Wrongful Birth Statute’s Disparate Impact on Women

When it comes to gender based discrimination under the Equal Protection Clause, “increasingly outdated misconceptions concerning the role of females in the home rather than in the ‘marketplace and world of ideas’” have been “rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.” *Craig v. Boren*, 429 U.S. 190, 198-99 (1976). The WBS is precisely that kind of statutory scheme, premised on outdated and discriminatory misconceptions about women.

Appellees will likely argue that *Craig v. Boren* is inapplicable because the WBS does not distinguish between males and females, and therefore, it is gender neutral. However, this argument would ignore that all provisions of a statute must be read together, in their proper context.⁶⁰

The caption of § 2931(2) is: “Birth of healthy child; claim for damages prohibited.” Read as a whole, § 2931(2) precludes all damages based on the rearing of a healthy child following birth, whether claimed by men or women with

⁵⁹ *International Paper Co. v. Inhabitants of the Town of Jay*, 736 F. Supp. 359, 363 (D. Me. 1990) (citing *Roe v. Wade* and *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)).

⁶⁰ See, e.g., *Novak v. Bank of New York Mellon Trust Co., N.A.*, 783 F.3d 910, 913 (1st Cir. 2015); *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (“Courts have a duty to construe statutes, not isolated provisions.”).

failed sterilizations. However, the WBS then purports to allow certain categories of damages for a failed sterilization procedure, including those for “hospital and medical expenses for sterilization and pregnancy,” pain and suffering associated with the pregnancy itself, and “the loss of earnings by the mother” during pregnancy. 24 M.R.S.A. § 2931(2).

The reading of § 2931(2) that Appellees urged the federal court to accept would foreclose damages for all women suffering from unintended pregnancies due to negligence, except for the narrow subset of women who seek tubal ligation as a form of contraception.

Playing Appellees’ desired construction of the WBS out to its illogical conclusion, this means that a man who impregnates a woman after using a defective condom cannot sue for “wrongful pregnancy,” but it does not matter because he has not suffered any of the kind of “harm” authorized by § 2931(2). Hence, he has been robbed of no remedy.

Appellees would likely argue that the father of Ms. Doherty’s baby boy is barred from suing them for wrongful pregnancy for the same reasons that Ms. Doherty’s claims should be dismissed. But again, it matters not because the father did not experience pain and suffering during pregnancy, lost wages during pregnancy, emotional distress, pain, or medical expenses related to the birth of the baby. Accordingly, the WBS has a disparate impact on women, but functionally

no impact on men. This disparate impact was summarized by Professor Catharine

A. MacKinnon as follows:

Because pregnancy can be experienced only by women, and because of the unequal social predicates and consequences pregnancy has for women, any forced pregnancy will always deprive and hurt one sex only as a member of her gender. Just as no man will ever become pregnant, no man will ever need an abortion, hence be in a position to be denied one by law.⁶¹

Similarly, the Supreme Court recognizes that: "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

There can be no straight-faced denial that the WBS has a disparate impact on women's access to the courts to seek a remedy for wrongful pregnancy. In addition, the WBS places an undue burden on pregnant women that would, in the employment context, violate the Federal Pregnancy Discrimination Act.⁶²

In *UAW v. Johnson Controls, Inc.*, the Supreme Court was faced with the question: "May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?" 499 U.S. 187, 190 (1991). The Court answered in the negative, explaining that the policy was "not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the

⁶¹ Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1319-20 (1991).

⁶² See *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.").

females.” *Id.* at 199. By the same reasoning, the WBS is not gender neutral because it does not impact men in the way it impacts women.

Statutes containing gender-based classifications are subjected to intermediate equal protection scrutiny. *State v. Mosher*, 2012 ME 133, ¶ 11, 58 A.3d 1070, 1073.⁶³ Intermediate scrutiny requires that the statute “must advance an important governmental objective and be substantially related to achieving that objective.” *Id.* In *Mosher*, this Court noted that a “regulatory scheme that permits men to be sentenced to two years of probation while women apparently may only be sentenced to one year of probation would not withstand constitutional scrutiny.” *Id.* at ¶ 12.

There is no compelling, important, or even legitimate government interest advanced by the WBS. Whether subjected to strict, intermediate, or even rational basis scrutiny, the WBS does not hold up and it must be struck down.

IV. EVEN IF THIS COURT READS THE STATUTE AS MERELY LIMITING KAYLA DOHERTY’S RECOVERY, CATEGORICAL ELIMINATION OF DAMAGES BASED ON THE REARING OF A HEALTHY CHILD WOULD BE UNCONSTITUTIONAL

As acknowledged by this Court, “it is conceivable that a statute could limit the measure of tort damages so drastically that it would result in a denial of the right to trial by jury and the denial of a remedy.” *Peters v. Saft*, 597 A.2d 50, 53

⁶³ See also Stephanie S. Gold, *An Equality Approach to Wrongful Birth Statutes*, 65 FORDHAM L.R. 3, Part II (1996) (“Wrongful Birth Statutes Constitute Gender-Based Distinctions and Therefore Warrant Intermediate Scrutiny.”).

(Me. 1991). *Peters* dealt with a \$250,000.00 damages cap under the Maine Liquor Liability Act, with this Court overturning the trial court's ruling that the cap was unconstitutional. *Id.* at 52-53.⁶⁴

Significantly, the statutory classifications in *Peters* were not suspect, and the plaintiff's pursuit of a negligence claim was "not a fundamental right." *Id.* at 53. Therefore, rational basis scrutiny was appropriate. *Id.* ("[T]he sole question is whether the Act bears some rational relationship to the stated governmental end.").

Unlike in *Peters*, here the WBS does create a suspect statutory classification because, as discussed above, the WBS is not gender neutral. Therefore, intermediate scrutiny must be applied.⁶⁵

Even if this Court reads the WBS as merely limiting a woman's right to recover damages for bearing and raising a child, there is no "exceedingly persuasive justification" for doing so, aside from the opinion that "motherhood is a blessing."⁶⁶ Also distinguishing the instant case from *Peters*, Ms. Doherty's fundamental right to reproductive freedom is abridged by the WBS, making any limitation on her damages highly suspect.

⁶⁴ See also 28-A M.R.S.A. § 2509, amended by L.D. 971 (2009).

⁶⁵ See *Cohen v. Brown University*, 101 F.3d 155, 183-84 (1st Cir. 1996) ("Under intermediate scrutiny, the burden of demonstrating an exceedingly persuasive justification for a government-imposed, gender-conscious classification is met by showing that the classification serves important governmental objectives, and that the means employed are substantially related to the achievement of those objectives.").

⁶⁶ See Michael T. Murtaugh, *Wrongful Birth: The Courts' Dilemma in Determining a Remedy for a "Blessed Event,"* 27 PACE L. REV. 241, 249-50 (2007) ("In the first wrongful birth suit, *Christensen v. Thornby*, the Minnesota Supreme Court denied the parents' claim, maintaining that the birth of any child was a 'blessed event.'").

Furthermore, the right to a jury trial means the right to have “a determination” made by the jury “with respect to those questions of fact that the substantive law makes material.” *Peters v. Saft*, 597 A.2d at 53. By completely abrogating Ms. Doherty’s right to recover for an entire category of harm suffered, the WBS removes her right to have a determination made by the jury as to compensatory damages. As discussed in Part III.A above, Maine plaintiffs must be afforded “a speedy remedy for every wrong recognized by law as remediable in court.” *Id.* at 54 (emphasis added). Removing an entire category of damages from Ms. Doherty’s cause of action fails this requirement.

If this were a constitutional limitation on damages, like a statutory cap, the jury would still be entitled to hear the evidence and decide the issues consistent with the right to a jury trial. The proper procedure is not to remove the issue of damages from the jury’s purview, but instead to ensure the jury learns nothing about the cap.⁶⁷

Eliminating an entire category of harm suffered by Ms. Doherty would also contravene the basic purpose of tort law, which is to “redress concrete loss that a plaintiff has suffered by reason of the defendant’s wrongful conduct.” *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Compensatory

⁶⁷ See *Brown v. Crown Equip. Corp.*, 445 F. Supp. 2d 59, 75 (D. Me. 2006) (citing Alexander, *Maine Jury Instruction Manual*, Comment § 7-101, at 7-109 (4th ed. 2005)).

damages are intended to make the plaintiff whole again.⁶⁸ If Ms. Doherty's concrete damages are drastically reduced by having an entire category of harm eliminated, she cannot be made whole.

The Massachusetts Supreme Judicial Court has rejected the idea that child rearing expenses should be limited in wrongful pregnancy actions, explaining that:

We see no validity to the arguments, sometimes made, that the costs of child-rearing are too speculative or are unreasonably disproportionate to the doctor's negligence. The determination of the anticipated costs of child-rearing is no more complicated or fanciful than many calculations of future losses made every day in tort cases.

Burke v. Rivo, 551 N.E.2d 1, 4-5 (Mass. 1990).

Relying on *Burke v. Rivo*, the Supreme Court of New Mexico analyzed the measure of damages to be awarded for wrongful pregnancy and found that the plaintiff who had been subjected to a failed sterilization "remained fertile despite her desire to be infertile. From the standpoint of the couple, their desire to limit the size of their family—to procreate no further—was frustrated. Within the Restatement's definition of harm, this was a loss or detriment to them." *Lovelace Medical Center v. Mendez*, 805 P.2d 603, 610 (N.M. 1991). In addition, the parents' interest in the financial security and economic stability of their family was impaired. *Id.* The Court disagreed with other decisions "declaring, in effect" that

⁶⁸ *Id.* at 419. See also RESTATEMENT (SECOND) OF TORTS §§ 901; 917 (1979) ("One who tortiously harms the person or property of another is subject to liability for damages for the consequences of the harm."); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 3, at 16 (5th 3d. 1984) ("Individuals have many interests for which they claim protection from the law, and which the law will recognize as worthy of protection.").

these kinds of harm are “not worthy of legal protection.” *Id.* at 611. Rather, the “interest in one’s economic stability” is one clearly deserving legal protection.⁶⁹

In stark contrast to the above rational approach to a complicated issue, the legislative history behind the WBS discusses “a lawyer’s gimmick to make sure that he gets every last drop of blood available,” and “a bugaboo” where “the sky is the limit,” the public has a “lottery minded . . . megabucks” mentality, and everyone is trying to get “rich quick.”⁷⁰ This string of bias against injured Mainers need not and never should have been codified by the Legislature. If a factfinder thinks that Ms. Doherty is not entitled to damages because any alleged harm has been offset by the blessing of motherhood, it can award her very little or nothing, just like in any other tort case.

Indeed, one of the ideas underlying the WBS—that children bring as much joy as they do challenges to the lives of their parents—means that the Legislature’s fear of a runaway jury is not only unconstitutional but entirely unfounded. For all of these reasons, this Court should refuse to limit Kayla Doherty’s recovery and reject the WBS’s discriminatory, outdated “public policy.”

⁶⁹ *Id.* However, the Court was mindful that such damages may be offset or mitigated by the benefit conferred on a family whenever a child is born. *Id.* at 613 (citing RESTATEMENT (SECOND) OF TORTS § 920 (1979)).

⁷⁰ 2 Legis. Rec. 1465-66 (2d Reg. Sess. 1986).

CONCLUSION

As to the first Certified Question, this Court should answer that the protection of the WBS does not apply to Merck & Co., Inc.

As to the second Certified Question, this Court should answer that *Macomber v. Dillman* does not apply to Kayla Doherty's claim against Merck as a drug manufacturer and product distributor.

Finally, as to the third Certified Question, this Court should answer that the WBS does not prohibit Kayla Doherty's recovery for wrongful pregnancy, and in fact the public policy announced in the statute violates the Maine and United States Constitutions. Further, any limitation of the damages recoverable by Ms. Doherty would fail intermediate scrutiny and violate her right to a jury trial. Therefore, this Court should impose no limitation on the damages recoverable by Ms. Doherty, consistent with the Massachusetts Supreme Judicial Court's opinion in *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990).

Dated at Kennebunk, Maine this 9th day of March, 2016.



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CERTIFICATE OF SERVICE

I, Laura H. White, attorney of record for Plaintiff/Appellant, hereby certify that I have on this 9th day of March, 2016 caused two (2) copies of the foregoing Brief of Plaintiff/Appellant to be served upon counsel of record in this action, by depositing the same in the United States mail, postage prepaid, addressed as follows:

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